SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. [redacted] 58

EDWARD SOMERVILLE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the statement of a witness that he was testifying because he expected leniency and did not want to go to the penitentiary but that he received no promises prior to testifying is perjurious in light of his testimony given five months later that the prosecutor told him that he could probably get leniency, but did not tell him that he would get leniency?

Whether the issue of knowing use of perjury can be raised when no evidentiary hearing was had under one of two available Illinois procedures?

REASON FOR DENYING THE WRIT

The Petitioner's assertion that the State knowingly used perjury is patently without foundation. He points to a single statement of an accomplice witness and concludes that it stands as proof of a concealed agreement which was made between the State and the witness whereby a promise of leniency was tendered.

The People submit that Petitioner has made unsubstantiated allegations which do not in any manner elevate themselves to the level of a showing of the knowing use of perjured testimony by the State. The record is manifestly clear that Leon K. Arnold, the accomplice witness, never testified that he was promised anything by the State's Attorney's Office or any other law enforcement agency of Illinois nor does the testimony in question lend itself to any such inference. It is without question that the full extent of the witness's interest in testifying was revealed to the trier of fact—the jury.

(Cross-Examination of Leon K. Arnold by John G. Cogan, Attorney for Edward Somerville).

Q. As far as you know the State's Attorney could forget about your case, isn't that right?

A. No sir.

Q. Are you hoping that he might do it?

A. He can't do that, I don't think.

Q. Are you hoping that he might do that?

A. As far as I am concerned, I don't think it is left up to the State's Attorney; it is left up to the Judge.

Q. Well you know what a nolle prosse is, don't you, that is when the State says, "I don't want to prosecute". Tuite can do that for you can't he?

A. I don't know.

Q. Ahe you hoping that he might do that?

A. It never entered my mind that he would do that.

Q. Well, you are testifying here against Edward Somerville, aren't you?

A. Yes, sir.

Q. And you are doing that for what purpose?

A. Because I expected leniency.

Q. How much leniency do you expect?

A. All I can get.

Q. Probation, for example?

A. I don't know.

Q. No prosecution, for example?

A. I don't know, sir.

Q. You don't want to go to the penitentiary do you?

A. No, sir.

Q. And that is why you are testifying, isn't it?

A. Yes, sir. (Abst. 8; Rec. 130-131).

The above quoted testimony in the Edward Somerville trial is no way contradictory to Leon Arnold's subsequent testimony in the trial of Donald Somerville and Marjorie Kullerstrand which testimony is set out in the Petition for Certiorari.

No factor bearing upon the issue of the witness's credibility was concealed by the People from the jury. The extensive cross-examination by defense counsel clearly exposed the witness's reason for testifying on behalf of the State—He did not want to go to the penitentiary; he ex-

pected leniency. The motive behind Arnold's testimony was before the jury. It cannot be seriously argued that the jury was in any manner impaired in ascertaining Arnold's credibility.

There is no marked variance substantiated in the record. The statement that the prosecutor said "he [the witness] could probably get leniency" cannot be equated with a commitment to that end. Mention of the probability of leniency does not in and of itself amount to a promise.

The record produced below is bare of any showing of concealment or knowing use of perjury. What is apparent is a clear lack of prejudice to the Petitioner.

A further reason for denying the writ is the state of the record in this case. The basis for the charge of concealment or knowing use of perjury is the statement of a witness at a trial taking place five months after the trial of this case. That statement in itself does not establish perjury. And, most significantly, the prosecution was never in a position to affirm, deny or clarify the statement supposedly made by a prosecutor. The issue was raised on a motion for new trial filed long after the proper time for the filing of such motions. Ill. Rev. Stat. 1963, Ch. 38, Sec. 116-1. The motion was filed after an appeal had been taken and the trial court had no jurisdiction. People v. Myers, 35 Ill. 2d 311, 337, 220 N.E. 2d 297, 312 cert. denied 385 U.S. 1019 (1966). The Petitioner ignored two proper remedies for the adjudication of claims of perjury by means of evidentiary hearings: a petition under section 72 of the Civil Practice Act (Ill. Rev. Stat., Ch. 110, Sec. 72; People v. Lewis, 22 Ill. 2d 68, 174 N.E. 2d 197 (1961)) or a post-conviction petition (Ill. Rev. Stat., Ch. 38, Art. 122; People v. Macias, 39 Ill. 2d 208, 211-12, 234 N.E. 2d 783, 786 (1968). In short the Petitioner has,

with admirable skill, created a record by making allegations in an improper proceeding where the court had no jurisdiction and the People had no opportunity to answer on the merits.

CONCLUSION

The People of the State of Illinois respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

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